Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-362

RANDALL ROBINSON — PETITIONER

VS.

COMMONWEALTH OF KENTUCKY — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT F. STEPHENS
ATTORNEY GENERAL

RAYMOND M. LARSON
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky, 40601

COUNSEL FOR RESPONDENT

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OPINION BELOW

Substantially, the same issues before this Court were presented by petitioner in his direct appeal of his conviction to the Supreme Court of Kentucky, whose opinion affirmed petitioner's convictions, a copy of which is included in petitioner's "Appendix A".

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court is properly made under the jurisdictional requirements of 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I

WHETHER THE SUPREME COURT OF KENTUCKY PROPERLY REJECTED PETITIONER'S CONTENTION THAT THE TRIAL COURT IMPROPERLY DETERMINED PROBABLE CAUSE EXISTED ON THE BASIS OF AN AFFIDAVIT FOR A SEARCH WARRANT.

II

WHETHER THE SUPREME COURT OF KENTUCKY PROPERLY REJECTED PETITIONER'S CONTENTION THAT THE PROSECUTOR'S CLOSING ARGUMENT WAS IMPROPER AND PREJUDICIAL ON THE GROUNDS THAT THE OBJECTIONS TO SAID ARGUMENTS WERE EITHER NOT PRESERVED OR PETITIONER RECEIVED THE RELIEF SOUGHT.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's Petition for Writ of Certiorari was filed pursuant to 28 U.S.C. § 1257(3) and he claims relief under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, Kentucky Revised Statutes 433.120, 433.290 and 433.640.

STATEMENT OF THE CASE

Based on an affidavit by Terry L. Gray, an officer of the Kentucky State Police (Transcript of Record, Volume 7, pp 2-5, [Hereinafter referred to as "TR"]), a search warrant was issued by the Henry County Judge, Roy Smith, (Transcript of Evidence, pp. 6-7, [Hereinafter referred to as "TE"]), to search the property owned by petitioner and his wife located in Henry County, Kentucky (TR, VOL. 7, pp. 6-7), a search pursuant to said search warrant revealed a list of property more than three legal pages long.

Brian Kruer testified that on several occasions during the two years prior to the arrest of the petitioner that he had been to the farm in Henry County owned by the petitioner (TE Vol. 4, p. 511). He further testified that the reason for his going to the petitioner's farm was to bring ". . . stolen cars and trucks and different other things that were stolen . . ." (TE Vol. 4, p. 511).

According to Kruer he stated that he brought the stolen merchandise to petitioner's farm at petitioner's request (TE Vol. 4, p. 511).

Petitioner was convicted under indictment of various charges of knowingly receiving stolen goods, KRS 433.290; defacing or altering farm tractor serial numbers, KRS 433.640; and possession of burglary tools, KRS 433.120, for which he received sentences totaling 63 years and a fine of $500.

REASONS FOR DENYING THE WRIT

I

THE SUPREME COURT OF KENTUCKY PROPERLY REJECTED PETITIONER'S CONTENTION THAT THE TRIAL COURT COULD NOT HAVE DETERMINED THAT PROBABLE CAUSE EXISTED ON THE BASIS OF THE AFFIDAVIT FOR THE SEARCH WARRANT HEREIN WHICH ALLEGEDLY CONTAINED AN INCORRECT STATEMENT.

Petitioner presents three "Reasons for Granting the Writ" in his Petition for Writ of Certiorari. His principal contention is that the trial court committed reversible error when it denied petitioner's Motion to Suppress Evidence obtained pursuant to a search warrant issued by Henry County Judge, Roy P. Smith. The foregoing principal contention is raised in both reasons 1 and 2 which he gives for "Granting the Writ". Petitioner argues in support of said principal contention that the search warrant was invalid because it contained an alleged falsehood as to the reliability of the unnamed informant.

As a result, petitioner reasons that the issuing Magistrate could not conclude that the unnamed informant was credible or his information reliable, and was unable, therefore, to determine the requisite probable cause as the basis for a validly issued search warrant.

We disagree that the issuing Magistrate was unable to determine probable cause from the affidavit presented in support of the search warrant herein. Respondent further submits that petitioner does not present any issue which should be reviewed by this Court.

The alleged incorrect statement revolves around a statement made by Terry Gray, an officer of the Kentucky State Police, in the affidavit in support of the search warrant submitted by him to Judge Smith. In said affidavit, Gray stated:

> "Said informant having been proved reliable by having previously given the Louisville Police Department who had advised the affiant information

> leading to the arrest and conviction of persons for the commission of other crimes."

At the preliminary hearing a contradiction to this statement appeared when Kruer, who was the informant, testified that he had never previously been an informant (TE, Pre-Trial Conference p. 5-6). On the basis of this contradiction, the petitioner contends that the Kentucky Police lied and inserted the falsehood in order to establish reliability. Petitioner again argues that the alleged falsehood invalidates the warrant.

The petitioner has failed to prove that the statement was indeed a falsehood. Although there is a contradiction, the statement made by Kruer does not necessarily mean that he had not previously given reliable information to the Louisville Police Department. At the Pre-Trial Conference, Commonwealth's Attorney Bruce Hamilton offered an explanation for the contradiction. His statements were in reply to Mr. Kaplan's argument that the Kentucky Police lied about the reliablity of the informant. In his response, Mr. Hamilton said:

> "I have the record of the Louisville Police Department here, Judge, if the court wants it. There is a number of cases that Kruer worked at and they are substantial . . . . The informant was telling they stole a car, Robinson stole a car there, when it was stolen, where it was stolen. The information was there. The Louisville Police were telling it. *The informant was verified and he was right.* (TE Pre-Trial Conference pp 23, 25) (Emphasis added).

The point that was being made was that the informant had given reliable information as to the crimes committed by Robinson and others and that his statement was credible. Once reliability has been proven, probable cause can be established.

The opinion rendered by the Supreme Court of Kentucky discusses specifically the issue here once again raised as follows:

> "The question of most importance in this case is whether evidence procured under a search warrant should have been excluded because the affidavit pursuant to which the warrant was issued contained an erroneous statement of fact.
>
> *The affidavit was prepared by the Commonwealth's Attorney for Henry County and executed by an officer of the Kentucky State Police. It stated, among other things, that the affiant had received from the Louisville Police Department and an unnamed informant advice to the effect that a large quantity of stolen property was in the appellant's possession at his home in Henry County.* The portion of the affidavit claimed to have been untrue is as follows: 'Said informant having been proven reliable by having previously given the Louisville Police Department who has advised the affiant information leading to the arrest and conviction of persons for the commission of other crimes.'
>
> As later disclosed, the informant mentioned in

> the affidavit had been an accomplice of the appellant in that the stealing and delivery of the property to the appellant's home had been carried out by prearrangement between them. The accomplice became a principal witness against the appellant both in the preliminary hearing (examining trial) held by the Quarterly Court and in the circuit court trial. At the examining trial he testified that this was the first time he had ever acted as a police informant.
>
> The fundamental purpose of requiring an affidavit in support of a search warrant is to protect persons and their property from searches that are not founded on probable cause. Though in some jurisdictions the determination of probable cause is not confined to the affidavit, from time immemorial it has been the rule in this state that it is. Bowen v. Commonwealth, 199 Ky. 400, 251 SW 625 (1923); Caslin v. Comonwealth, Ky., 491 SW 2d 832, 834 (1973). We are not at all convinced that the rule is unsound.
>
> It is likely that the alleged misstatement in the affidavit was an honest mistake. The officer who made it was not called to testify, nor was the Commonwealth's Attorney who had prepared it. It appears from the face of the affidavit, however, that in the course of a thorough investigation of the case the officer had received a good deal of information from the Louisville Police Department. In due course, after gathering further details, he took his information to the Commonwealth's Attorney, who paraphrased it in the form of an affidavit. It is not un-

natural that in this process of telling and retelling, inaccuracies would develop. We do not say that there will never be an instance in which this court will hold a search warrant invalid by reason of a clear and deliberate perjury in the supporting affidavit, but we have no reason to believe that this is such a case.

There is still another reason why the warrant should not have been quashed. *The affidavit contained more than three legal size pages of information. The officer's cause for believing that the stolen property was on the appellant's premises was not confined to what he had heard that the informant had told the Louisville police. Among other things disclosed by the affidavit, the place had been under surveillance, and the officer had seen 'pictures of the stolen property in the barns and home above described,' etc. From a stem-to-stern reading of the affidavit it is our opinion that it would have provided probable cause for the warrant without the details attributed to the informant."*

Petitioner candidly admits that this Court through its holdings in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969) clearly permits the use of confidential informants to establish probable cause for the issuance of search warrants. Furthermore, in order to establish probable cause by the use of such unnamed informants that the affiant must present some of the underlying circumstances from which the informant concluded that the thing to be seized was where he claimed it was and presents some of the underlying circumstances from which the affiant concluded that the informant was credible or his information reliable. Futhermore, this Court permits the informant's allegations to be corroborating by independent sources and thereby rendered sufficiently reliable for establishing probable cause.

In *Aguilar, supra,* the affidavit condemned by the Court therein contained no affirmative allegations that the affiant spoke with any personal knowledge of the matters contained therein. Nor did it indicate any sources for the complainant's belief, nor set forth any further sufficient basis upon which a finding of probable cause could be made. The affidavit in *Aguilar, supra,* not only contained no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein, it did not even contain an affirmative allegation that the affiant's unidentified source spoke with personal knowledge. All that appeared therein were mere suspicions, belief or conclusions.

This Court in *United States v. Harris,* 403 U.S. 573 (1971) held as follows:

> "Where, as in this case. the affiant states under oath that he has been informed of the existence of certain criminal activity, but has not observed that activity himself, a magistrate in discharging his duty to make an independent assessment of probable cause can properly issue a search warrant only if he concludes that: (a) the knowledge attributed to the informant, if true, would be sufficient to establish probable cause; (b) the affiant is likely relating

truthfully what the informer said; and (c) it is reasonably likely that the informer's description of criminal behavior accurately reflects reality.

* * *

Our cases establish that this element is satisfied only if there is reason to believe both that the informer is a truthful person generally and that he has based his particular conclusions in the matter at hand on reliable data, Aguilar v. Texas, supra; Spinelli v. United States, supra, for it is not reasonable to invade another's premises on the basis of information, even if it appears quite damning, when simply taken at face value, unless there is corroboration of its trustworthiness. * * * [O]ur cases have established that where the affiant relies upon the assertions of confidants to establish probable cause, the affidavit must set forth facts which enable the magistrate to judge for himself both the probable credibility of the informant and the reliability of his information, for only if this condition is met can a reviewing court be satisfied that the magistrate has fulfilled his constitutional duty to render an independent determination that probable cause exists. Aguilar v. Texas, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964); Spinelli v. United States, 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969) Cf. Giordenello v. United States, 357 U.S. 480, 2 L.Ed. 2d 1503, 78 S.Ct. 1245 (1958); Nathanson v. United States, 290 U.S. 41, 78 L.Ed.2d 159, 54 S. Ct. 11 (1933); Whiteley v. Warden, 401 U.S. 560, 28 L.Ed. 2d 306, 91 S.Ct. 1031 (1971)." at pp 736-737.

In the instant case the affidavit contained more than three legal pages of information. The affiant's cause for believing the stolen property was on the petitioner's premises was not confined to the information which the undisclosed informant had furnished the Louisville Police Department. The affiant in his affidavit swore that he, among others, had placed certain described stolen property which was located on petitoner's property under surveillance for a period of time. Such personal observation provides some underlying circumstances by which the affiant could reasonably conclude that the informant was credible and his information reliable. Further as disclosed by the affidavit, affiant had seen pictures of the stolen property in the barn and in the home described in the affidavit.

Clearly, the tests set forth in *Aguilar, supra,* and *Spinelli, supra,* and their progeny have been satisfied and the issuing Magistrate was presented an affidavit from which he could and did properly establish probable cause to issue the search warrant herein. No error occurred.

II

THE SUPREME COURT OF KENTUCKY PROPERLY REJECTED PETITIONER'S CONTENTION THAT THE PROSECUTOR'S CLOSING ARGUMENT WAS IMPROPER AND PREJURICIAL BY HOLDING THAT THE OBJECTIONS TO SAID ARGUMENTS WERE EITHER NOT PRESERVED OR PETITIONER RECEIVED THE RELIEF SOUGHT.

Finally, petitioner argues that in the case at the bar the prosecutor made numerous improper and prejudicial

statements which deprived petitioner to his right to a fair trial based on the evidence. In support of such an argument, petitioner cites three instances during the closing argument of the Commonwealth's Attorney which he contends constitute such prejudicial error as to require reversal. First, he objects to the following statement by the Commonwealth's Attorney:

> "But Chisholm took a picture of it. We went back to pick up the camera and it had gone. So, we brought you the picture. For the first time the other day, Peter Outlaw told me, 'Say, that camera. I got it back in the case.' 'How did you get it?' He said, 'I don't know.' I said, 'What do you mean?' He said, 'I walked in and it was on the floor.' 'Was your door locked?' 'Yeah, the door was locked.' 'Was the door locked when you went in?' 'Yeah.'
>
> Peter Outlaw was intimidated. He was thinking, that could have been a bomb or a case of dynamite or anything else on his floor. What kind of people are you dealing with?
>
> MR. KAPLAN: Judge, may I approach the bench?
>
> THE COURT: All right.
>
> * * * * *

At the bench:

> MR. KAPLAN: I object to Mr. Hamilton talking about bombs and threatening acts when there is absolutely no evidence that it could have been a bomb.

> MR. HAMILTON: It is a fair comment, Judge. On the way the door was opened, it could have been anything in there." (TE pp 706-707).

In this instance petitioner objected to the foregoing statements and requested the court to admonish the jury as follows:

> "THE COURT: Ladies and gentlemen the defense counsel has called to the Court's attention, there has been no evidence in this case about any bombs in the case. So, you are admonished to disregard the comments and statements about being a bomb in this case. So, let's proceed, gentlemen." (TE p 708).

Clearly, petitioner received the relief (the foregoing admonition by the court) which he sought. Such being the case, he should not be now permitted to complain about the court's conduct when the record clearly reflects he was satisfied with the court's admonition.

Secondly, petitioner complains about the following statement made by the Commonwealth's Attorney during his closing argument:

> "Brian Kruer is under guard. He is under a Federal program. He don't (sic) start a car without looking under the hood. He don't (sic) walk around the corner without somebody looking." (TE Vol V, p 716).

As a basis for his objection petitioner argues that there was no evidence of record to support such a statement by the Commonwealth's Attorney.

The transcript of evidence reveals that Brian Kruer

testified, under cross-examination by counsel for the petitioner, as follows:

> "Q. Brian, since October 10, 1974, have you been steadily employed?
>
> A. No, sir, I haven't. I have been under Federal protection to the Government.
>
> Q. So, you haven't worked at all?
>
> A. Well, yeah, I have worked but under the Government protection, I have been away in different states and different areas.
>
> Q. And you haven't had a steady job then, is what I am asking you?
>
> A. Well, I haven't been able to because the Government protection, they keep you some place for a while and then move you and your family to another state and so on." (TE p 605).

The cases are legion in whch the Supreme Court of Kentucky has held that a Commonwealth's Attorney is allowed considerable latitude in argument and he is entitled to draw reasonable inferences from the evidence and to make reasonable arguments thereunder. See *Hunt v. Commonwealth*, Ky., 466 S.W. 2d 957 (1971).

Clearly, in the instant case the comments by the Commonwealth's Attorney to which petitioner now complains, when placed in the proper context, are reasonable inferences from the statements of Brian Kruer wherein he stated that he was under federal protection, and that

he was kept on the move with his family. Such being the case petitioner's argument is without merit.

Finally, petitioner only now complains that the following statement made by the Commonwealth's Attorney during his closing argument deprived petitioner of his right to a fair trial:

> "Kruer is a thief. He took the stand and told you he was a thief. Kruer told you the truth from that stand. I hope you realize it and understand it." (TE Vol. V, p. 714)" "I don't know what the differences between Kruer and between Robinson but Kruer is not on trial here today. The only thing you remember is the testimony that he gave from that stand and I think he told us the truth." (TE, Vol. V. p. 715).

This portion of the closing argument of the Commonwealth's Attorney was not questioned in petitioner's direct appeal to the Supreme Court of Kentucky. However, it is important to note that no objection was made to the foregoing comments at the time they were made by counsel for petitioner at trial and as such, the alleged error of the alleged prejudicial comments, if prejudicial at all, were not preserved for appellate review. The Kentucky Supreme Court has consistently held that in the absence of a timely objection, the petitioner has not preserved for an appeal an alleged error, *Jackson v. Commonwealth*, Ky., 450 S.W.2d 244 (1970).

We note that petitioner quotes from *Berger v. United States*, 295 U.S. 78 (1935) wherein the role of the prosecutor is described by this Court as follows:

". . . he is in a peculiar and very definite sense the servant of the law, the two fold aim of which is that guilt shall not escape nor innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Berger v. United States, supra,* 295 U.S. at 88."

However, we are compelled to agree with the role of the prosecutor as described by this Court in *Berger.* However, we heartily disagree with petitioner's complaint that the statements in *Berger, supra* render very little guidance as to where to draw the line between proper and improper prosecutorial argument. We must further disagree that this Court need impose more specific boundaries than those contained in *Berger, supra.*

Very clearly, the Court in *United States v. Leon,* 534 F. 2d 667 (6th Cir. 1976) (cited in petition), established specific boundaries within which a prosecutor may properly argue his case. In *Leon, supra,* the Court's opinion written by Justice McCree condemned as improper and prejudicial the prosecutor's argument as follows:

"In the case before us, not only did the prosecutor inject inadmissible and irrelevant information into the trial but also, despite objection, the court permitted this information to be placed before the jury and informed it that the argument was proper.

Moreover, the prosecutor continued his prejudicial

remarks even after the court on further consideration advised him to stop, and the court did not admonish the jury to disregard the argument at the time it was made nor did the court give an appropriate cautionary instruction. Because of these occurrences and because the trial record discloses that one of the jurors stated, during *voir dire,* that he was not opposed to gambling as long as it did not hurt innocent people, we conclude that the statements were deliberately, not inadvertently, injected into the proceedings." at p. 681.

In the case at the bar the comments complained of by petitioner were dealt with by the Kentucky Supreme Court as follows:

"During the course of the Commonwealth's closing address to the jury the appellant objected to a comment relating to the strange reappearance of a stolen camera in the owner's locked apartment. The objection was sustained, counsel requested an admonition, and the admonition was given. He did not move for any further relief and therefore is not in a position to claim that a mistrial should have been declared. Humphrey v. Commonwealth, Ky., 442 S.W. 2d 599, 601 (1969). Other objections to remarks made by the prosecutor were not sufficiently preserved for review. Cf. Johnson v. Commonwealth, Ky., 505 S.W.2d 470, 471 (1974); Mahan v. Commonwealth, Ky., 286 S.W.2d 93, 94 (1956); May v. Commonwealth, 153 Ky. 141, 154 S.W. 1074, 1080 (1913)." (Opinion pp 4-5)

It should be emphasized that the first complained of remarks by the Commonwealth's Attorney were objected to and the jury was admonished, as requested by petitioner's attorney. Thereafter, the remarks of the Commonwealth's Attorney to which petitioner now objects were not preserved for appellate review. Moreover, it should be noted that those comments when placed in the proper context are nothing more than reasonable inferences from evidence of record. The argument of the Commonwealth's Attorney in the case at the bar is well within the bounds of propriety permitted by both state and federal law and does not constitute prejudicial statements which deprive petitioner of his right to a fair trial based on the evidence presented. The arguments to the contrary are not withstanding.

CONCLUSION

In the instant case the Kentucky Supreme Court, after considering the entire record, correctly and properly affirmed petitioner's conviction. Respondent submits that the decision by the Kentucky Supreme Court is clearly correct and does not conflict with any applicable decision of this Court and the Petition for Certiorari should be denied.

Respectfully submitted,

ROBERT F. STEPHENS
ATTORNEY GENERAL

RAYMOND M. LARSON
ASSISTANT ATTORNEY GENERAL

and James M. Ringo

JAMES M. RINGO
ASSISTANT DEPUTY ATTORNEY GENERAL.
COMMONWEALTH OF KENTUCKY
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR RESPONDENT

PROOF OF SERVICE

I, James M. Ringo, one of counsel for respondent, hereby certify that the foregoing Brief was served on petitioner by depositing three copies of same in the United States mail, first class postage prepaid, on October 4th, 1977, addressed to Honorable Frank E. Haddad, Jr., 529 Kentucky Home Life Building, Louisville, Kentucky 40202, Counsel for Petitioner.

James M. Ringo

James M. Ringo
Assistant Deputy Attorney General
Commonwealth of Kentucky

COUNSEL FOR RESPONDENT